UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SIMPLEX GRINNELL, DISTRICT 129,

and **Case No. 01–CA–169310**

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL–CIO.

Counsel:
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DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves two sprinkler fitter employees discharged in early February 2016 for submitting falsified timesheets that significantly overstated their compensable work time. Neither employee could offer the employer a legitimate explanation for the time discrepancies and neither testified in the National Labor Relations Board (Board) hearing conducted over their discharges.

The government alleges that the two were discharged in retaliation for testifying in an earlier case—in a Board election representation hearing conducted in September 2015. That hearing resulted in the December 2015 rerun of a union election based on objectionable conduct by the employer.[1]

In the instant unfair labor practice case, the government and the union fail to offer evidence to contest the employer's account of the employees' misconduct. However, they argue that the "time-card fraud" was not a true motivation for the discharge, that it was a pretext, and that in any event, under the National Labor Relations Board's *Wright Line* decision, the employer

[1]The government also alleges that the discharges were in retaliation for union activity generally, but, as discussed herein, no record evidence speaks to that issue.

was required but failed to prove that it would have discharged the employees in the absence of the employees' protected activity.

As discussed herein, I assume that the government has met its burden under *Wright Line* to prove unlawful motivation for the discharges. With that said, contrary to the government's claim, there is no convincing evidence that the employer's time-card-fraud explanation for the discharges is a pretext. There is no evidence countering the credibly offered claim by the employer that in discharging these employees, it acted in conformity with its policies against the submission of falsified time records. There is no evidence, as claimed by the General Counsel, that other employees were allowed to misstate their time records, much less that the employer knew about it and countenanced it. Under the circumstances, I find that the employer has proven that it would have taken the same action against these employees even in the absence of their protected activity. Accordingly, I dismiss the complaint.

STATEMENT OF THE CASE

On February 8, 2016, Road Sprinkler Fitters Local Union No. 669, AFL–CIO (Union) filed an unfair labor practice charge alleging violations of the Act by Simplex Grinnell, District 129 (Employer or Simplex Grinnell). Region 1 of the Board docketed this charge as Case 01–CA–169310. The Union filed an amended charge in the case on March 8, 2016, a second amended charge on April 18, 2016, and a third amended charge on August 2, 2016.

Based on an investigation into this unfair labor practice case, on August 26, 2016, the Board's General Counsel, by the Acting Regional Director for Region 1 of the Board, issued a complaint and notice of hearing alleging that Simplex Grinnell had violated the Act. On September 9, 2016, Simplex Grinnell filed an answer denying all alleged violations of the Act.

A trial in this case was conducted on November 15–17, 2016, in Hartford, Connecticut. Counsel for the General Counsel, the Respondent, and the Charging Party filed post-trial briefs in support of their positions by January 12, 2016.

On the entire record, I make the following findings, conclusions of law, and recommendations.

Jurisdiction

Simplex Grinnell is a limited partnership with a facility located in Windsor, Connecticut. It is engaged in the business of providing fire protection, sprinkler, and suppression systems to residential and commercial customers in the United States. During the 12-month period ending July 31, 2016, Simplex Grinnell, in conducting its operations, purchased and received at its Windsor, Connecticut facility goods valued in excess of $50,000 directly from points outside the State of Connecticut. At all material times, Simplex Grinnell has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

Simplex Grinnell operations

Simplex Grinnell installs and services sprinkler and fire suppression systems to commercial and residential customers. This employer, a subsidiary or affiliate of Tyco, services customers throughout Connecticut and western Massachusetts from its facility in Windsor, Connecticut. At its Windsor facility, Simplex Grinnell employs approximately 15 sprinkler fitters (fitters) and apprentices who install and repair sprinkler systems. At this location, it also employs approximately 40 inspectors who inspect customers' premises to assess what work is required. The Employer also maintains employee departments at the Windsor facility devoted to fire alarm work and fire suppression. In all, including sales and administrative staff, approximately 150 employees work from the Windsor facility.

Fitters are dispatched in company trucks to customers throughout Connecticut and western Massachusetts. During the day, the fitters are sent assignments through phone apps or through phone calls with a dispatcher. The fitters' trucks are outfitted with GPS equipment that creates a time-marked record of the location of the vehicle whenever the vehicle's ignition is engaged. When completing assignments, the fitters take a photo of the customer-signed service request ticket and the ticket is sent to a central billing office at corporate headquarters in western Massachusetts where a company called ACE processes customer bills. The billers at ACE create and send out bills to customers. A few times a week the ACE billers contact Sprinkler Service Manager Steven Jaquith with questions about transmitted paperwork that is not legible or adequately completed so that the billing can proceed. Fitters also submit weekly timesheets on Friday mornings that list their compensable daily hours worked and listing the hours spent on each customer assignment.

Sprinkler Service Manager Jaquith regularly reviews employee timesheets. He reviews service tickets less thoroughly, but he estimated that because of questions from ACE billers he "could spend an hour a day doing just the service reports, anything that had questions or requires me to review." Jaquith has access to the drivers' GPS records but only reviews them occasionally, when he feels it is necessary. ACE billers do not have access to or involvement with the GPS records.

Hours billed by employees on service tickets do not necessarily correspond precisely to compensated work time claimed by the employees on the timesheets: time can be claimed for non-customer billed work, such as time spent training, corresponding with the office, "shop" (maintenance) work, and administrative work (generally paperwork or safety-related training). Small variances between timesheets and service tickets could occur for many legitimate reasons and are not always accounted for. Thus, Jaquith testified that a one hour difference between an employee's service tickets and timesheet would not raise "a red flag" in his mind that uncompensated time was being illegitimately claimed.

Simplex Grinnell maintains work rules set forth in a Tyco "Guide to Ethical Conduct." The guide is distributed to all employees and employees have access to it on the Employer's computer portal. Both employees whose discharges are at issue in this case (Chris Lawlor and Jozef Bieluch) signed acknowledgements that they read an understood the policies in the guide and understood "that I am required to comply with the policies in the Guide." The guide includes prohibitions on "fraud" and a section on "financial integrity" that defines engaging in fraud as "the

act of intentionally cheating, tricking, stealing, deceiving, or lying" and states that it is "dishonest and generally criminal." The section further states that "intentional acts of fraud are subject to strict disciplinary action," and includes as "[e]xamples of fraudulent activity . . . Submitting false expense reports," "Misappropriating assets or missing company property" and "Making an entry in company records that is deliberately not in accordance with proper accounting standards."

Representation elections

On August 13, 2015, a union representation election was conducted by the Board among the Employer's unit of approximately 15 fitter employees. The vote was 9 to 5 against union representation (with one challenged ballot). The Union filed objections to conduct affecting the election. On September 9–10, 2015, a hearing was conducted over six union objections.

At the September 2015 representation hearing, three employee witnesses were called by the Union to testify, including Chris Lawlor and Jozef Bieluch. The employer called four witnesses, two supervisors and two employees.

The hearing officer overruled four of the Union's objections and sustained two. The two sustained objections involved (1) statements in an August 5, 2015 slide show presented to employees that were found to have effectively amounted to statements of the futility of unionization; and (2) an interrogation of Lawlor about the union campaign by the employer's district manager that occurred in the third week of July 2015. As to the latter objection, Lawlor's testimony was credited over that of the manager.

Based on the two sustained objections, the hearing officer recommended that the election be set aside and that a new election be conducted. A second election occurred in December 2015. In that second election, a majority of the unit again voted to reject union representation.

The discharges of Lawlor and Bieluch

Lawlor discrepancies

On or about January 21 or 22, 2016, Manager Jaquith received a call from the ACE billers seeking clarifications about the part number and pricing for a customer service ticket submitted by Lawlor. ACE needed the additional information in order to know how much the customer should be billed. This was not, in itself, unusual. As referenced, the ACE billers contacted Jaquith as often as weekly to seek additional information about an illegible or otherwise incomplete ticket. However, in this case, upon review of the ACE complaint, Jaquith recognized an inconsistency in the service ticket sheet and the timecard submitted by Lawlor. For a January 15, 2016 job at Market Square apartments, in Newington, Connecticut, Lawlor's customer service ticket—which is the document signed by the customer and a photo of which is sent to ACE for billing purposes—reported 4.5 hours of labor with travel time of 0.5 hours for a total of 5 hours billed. However, the weekly timesheet submitted by Lawlor to be paid for this job claimed 8 hours for this particular job.

Jaquith pulled the GPS records for that day for Lawlor's truck, and saw that the records did not add up. The GPS records showed that Lawlor's vehicle left the employer's facility at 8:14 a.m., arrived at the Market Square apartments address at 8:43 a.m., and remained there until 11:26 a.m., approximately 2 ¾ hours.

By 1:19 p.m., after some stops at additional addresses in Newington, the GPS reflects that Lawlor left for a service call in Stamford, Connecticut at 101 Park Place. In reviewing these documents, Jaquith saw that Lawlor had claimed overtime pay on his timesheet for 6 hours for the second assignment at 101 Park Place in Stamford. However, the GPS records showed that Lawlor left for Stamford at 1:19, p.m., arrived there at 2:36 p.m., and left Stamford for home at 3:02 p.m., less than 25 minutes after arriving, and approximately 3.5 hours after leaving the morning job. In total, for the day, Lawlor billed 14 hours, even though he left the shop headed for the Market Square apartments at 8:14 a.m., and was home by 5:22 p.m., just over 9 hours later.[2]

After reviewing these records, Jaquith contacted his Regional HR Manager Sarah Hodes, who oversees HR for the New England region and for part of New York for Tyco. Jaquith reported what he found to Hodes, sending her a comparison of the service request sheets and the timesheets, along with the GPS records for these trips. Hodes asked Jaquith to pull and review the GPS records for Lawlor for December and January, and review them. When Jaquith did this, he found additional discrepancies—on December 5, and 6, 2015. He sent Hodes the records for both.[3]

Bieluch discrepancies

Later in January, the ACE billers contacted Jaquith about a service report submitted by Bieluch, in which the amount of time to bill the customer for work performed on January 5, 2016, had been left blank. ACE needed the information in order to know how much to bill the customer. This has happened before, and Jaquith typically contacts the fitter or alternatively, looks up the relevant timesheets and paperwork himself to determine the proper billing.

Jaquith testified that in this case "I believe I called him a number of times" and "[c]ouldn't get a hold of him." Jaquith testified that he "probably" left Bieluch a message, may have texted him and "[m]ay have even sent an email." Jaquith needed to know the hours that Bieluch was onsite in order to be able to tell ACE what to bill the customers. A few hours later, or perhaps the next day, having not heard from Bieluch, Jaquith pulled the GPS records for the service date.[4]

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[2]During his investigation Jaquith determined that some time passed between Lawlor finishing the assignment at Market Square in Newington and receiving the new assignment for 101 Park Place in Stamford. Jaquith agreed with questions posed by counsel for the General Counsel indicating that Lawlor would still be "on the clock" while waiting for the new assignment. But this does not come close to accounting for the 14 hours that Lawlor billed for this day.

[3]The additional discrepancies sent to Hodes included a December 5, 2015 ticket and timesheet listing 5 hours of work for Chemtura, while the GPS records showed between 3.25 and 3.78 hours on the clock associated with this job (it is unclear from the record whether he finished and left Chemtura at 9:10 a.m. or 9:42 a.m.). On December 6, 2015, Lawlor submitted a timesheet listing 6 hours for work at the University of Connecticut at Farmington, (at double-time rates, itself uncommon) while GPS records showed he was there 4 hours and 21 minutes before leaving Farmington for an address near his home in Enfield, Connecticut.

[4]The General Counsel faults (GC Br. at 18, 29) the Respondent for not providing "corroborating" records or a "corroborating witness" for Jaquith's testimony that he "believed" he and the dispatcher both tried to contact Bieluch before checking the records. Jaquith's admittedly tentative testimony was unrebutted. I credit it. And of course, the obvious witness to rebut or corroborate this evidence would have been Bieluch, the alleged recipient of the calls. The General Counsel did not call Bieluch to testify.

Jaquith found discrepancies between the GPS records and the timesheet submitted by Bieluch. On review of Bieluch's January 5 GPS records, Jaquith found 8 hours work claimed at the Vernon Manor job site, although the records showed Bieluch spent only 5.5 hours there and left at 12:45 p.m., and did not perform any additional work for the day. Jaquith testified that his scheduler and supervisor informed Jaquith that Bieluch did not call into the office for additional work.

These records were sent to Hodes. Hodes asked Jaquith, as she had with Lawlor, to look back over Bieluch's records for December and January. He did and found additional discrepancies.[5]

Further action

At some point in time, although it is unclear from the testimony when, Hodes told Jaquith to randomly review other fitters, inspectors, and technicians from the other departments to see if similar discrepancies were found. Jaquith randomly pulled the GPS records for a total of approximately 6-9 other employees from a variety of the departments, reviewed them, and sent the GPS results, along with service tickets off to Hodes via email. He testified that he found no discrepancies in his random review.[6]

[5]Bieluch's December 4, 2015 timesheet shows that Bieluch claimed 8.5 hours for a job at 855 Main street, in Bridgeport, Connecticut, with a service ticket charging the customer for 8 hours. He was onsite less than 6.5 hours, and even accounting for travel time, the records would not support more than 7 hours. Bieluch's December 5, 2015 timesheet showed inspection work in Hartford, Connecticut, at which he spent 6 hours and 11 minutes. Bieluch's timesheet charged for 8 hours (two 4-hour blocks). On December 7, 2015, Bieluch claimed 8 hours on his timesheet for a job at CT Gymnastics Academy in Wallingford, Connecticut. He arrived at 7:41 a.m., and according to the GPS would have been entitled to 32 minutes of travel time from home (the time exceeding 45 minutes, as the records showed him leaving home at 6:24 a.m.). The vehicle left the job site at 1:36 PM, a total of 6.5 hours. Jaquith testified, without contradiction, that when questioned about this discrepancy Bieluch had no explanation and did not offer a claim that he was performing compensable work for the hour and a half extra time claimed. Jaquith testified that in his review he also saw that on December 18, 2015, the hours Bieluch sought did not add up. According to the records, on that day, at 2:44 PM, Jaquith texted Bieluch asking him if he wanted to take an emergency call for a leak in a pipe at Watertown High School. Jaquith knew that the call would be on Bieluch's way home. The records show that Bieluch stayed at the high school for 30 minutes, but recorded 4 hours of time for the job on his timesheet. There were also discrepancies in a job earlier that day at Lowe's in Orange, Connecticut, leading to significant overstatement of his work time according to Jaquith.

[6]The Respondent represented at trial that these documents were not in existence. I do not conclude from this that there was no random review, though it is a factor I consider. I credit Jaquith's testimony and believe that he conducted a cursory random review. I do conclude that it was more haphazard and less thorough than suggested by Jaquith. It was, essentially, an afterthought, to make sure that time card fraud was not rampant. It certainly was not of the scope suggested in the compliance report, discussed below, which was submitted by Hodes to corporate officials in support of the discharges. I note that the General Counsel called Hodes as a witness but did not question her about the matter.

After Hodes reviewed what Jaquith sent her, Hodes and Jaquith met with Lawlor, and then met with Bieluch, on approximately February 1, 2016. The evidence is undisputed that neither Lawlor nor Bieluch provided any legitimate explanation for the discrepancies brought to their attention. Lawlor and Bieluch were told that they were suspended pending investigation.[7]

Hodes recommended their termination to a corporate "Compliance Committee"—an internal board composed of management employees from HR, business, and in-house counsel within the Tyco organization. She spoke on the phone to "our in house counsel to review the findings of the day." That same afternoon, Hodes typed up a report to submit to the compliance committee while the interviews with Lawlor and Bieluch were "fresh in my brain." The report, which had originally been prepared and submitted January 29, 2016, was finalized with the additional information gleaned from the interviews of Bieluch and Lawlor and submitted to the compliance committee on February 2. This final report noted that

> Joe Bieluch and Christopher Lawlor, both sprinkler service technicians in Hartford, CT, were found during a recent audit to have falsified their timesheets on numerous occasions.
>
> During a review of timesheets from December 2015 and January 2016, Steven Jaquith, Sprinkler Department Manager, found a discrepancy in what he knew to be hours worked and what was represented on Christopher Lawlor's timesheet. This resulted in a further audit of the department, where it was discovered that Jozef Bieluch was also miss-representing [sic] time on his weekly timesheet.
>
> Joe repeatedly over stated hours worked at customer sites, which was validated by reviewing GPS reports from his company vehicle.
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> 12/4/2015 - worked 7.5 hours (including drive time) and report 8.5
> 12/5/2015 - worked 6 hours, reported 8
> 1217/2015 - worked 6.5 (including drive time), reported 8
> 1/5/12016 - worked 4.5 (including drive time), reported 6
>
> Chris repeatedly over stated hours worked at customer sites, which was validated by reviewing GPS reports from his company vehicle.
> 12/5/2015 - worked 3 .*5* hours, reported 5
> 12/6/2015 - worked 4.25 hours, reported 6
> 1/21/2016[8] - worked 9, reported 14

[7]According to the report on the disciplines Hodes sent to corporate officials, Bieluch purported to explain all four incidents by claiming that "he was told to report 8 hours worked even if the job took less time." However, the report indicates that Bieluch could not say who told him this or when and admitted that "as a result of his sheet we were improperly billing labor to the customers." Lawlor had no explanation for two incidents, claimed one was the result of "over calculation," and admitted to overbilling the customer on the remaining incident. Lawlor claimed that "everybody did this." Jaquith recalled Hodes taking notes in the meetings, but Hodes did not recall whether she did or not, and was unable to produce any notes from the meetings.

[8]This date is misstated in the compliance report. It is actually January 15, 2016.

In interview on Feb 1, 2016, with Steve and Sarah, Joe indicated that he was told to report 8 hours worked even if the job took less time. This was his explanation for all four incidents that were reviewed. When asked about using admin time or shop time to report hours, Joe indicated he was told not to do that and all hours should be tied to an SR. When asked who instructed Joe to do so, he was not able to provide specifics or give any detail on when this was communicated. Joe admitted in interview that he knew as a result of his sheet we were improperly billing labor to the customers. Interview concluded with Sarah explaining the severity of the situation and suspended Joe pending further investigation. While being escorted out of the building by Steve, he did state that he thinks this is retaliation for the "union BS."

Steve and Sarah then interviewed Christopher Lawlor, who started the interview very defensively indicating we should just walk him out before we even asked a question. Sarah began with reviewing 1/15 where he worked 9 hours and reported 14 hours (8 regular, 6 OT) on his timesheet. In review of GPS report, Chris was at his first customer site for about 3 hours including drive time and then his vehicle sat for 2 hours and the second customer visit took about 4 hours including drive time. When asked why he overstated the hours, Chris indicated that the first customer of the day had a work order with 8 hours quoted, so that is what he wrote on his timesheet even though he admitted he did not spend that much time at the customer site. The afternoon customer was a bit of a drive away, so Chris stated he must have just over calculated the hours for that day. When we reviewed two more instance[s] on 12/5 and then 12/6 where hours were overstated on his timesheet based on the GPS record, Chris had no explanation. When asked if there was anything else we needed to know, Chris was rather quiet and said nothing else at this time. Chris was also suspended pending further investigation, and was escorted out by Steve. Chris commented this is BS, everyone does this, and this is just cause of the "union shit."

Steve and Sarah reviewed timesheets for the rest of the team prior to these interviews and validated that in fact, the rest of the team is accurately reporting time on their timesheets service tickets and debriefing in work order management. Steve also confirmed that the department regularly communicates with the office when a job ends early. Steve has spoken to the whole team on several occasions about the proper way to fill in timesheets and service tickets. Steve also confirmed that both Joe and Chris have accurately utilized the time entry codes of Shop Time or Admin Time when their jobs end early on a given day and called the office for additional work assignments.

Once[ ] the behavior of these two employees came to light, Steve audited the rest of the sprinkler department as well as electronic service technicians, and no other anomalies such as these were discovered.

This behavior is not condoned by the business and has resulted in termination of employment in the past. The details outlined were also reviewed with legal before interview and suspension of employment in both cases.

Claim Substantiated for both Bieluch and Lawlor.

Bieluch claimed this is how he was instructed to complete his timesheet; however, in review of the rest of the department's practices, that is not the case. In fact, the other technicians regularly communicate with the office based team members when an assigned job for the day wraps early. Lawlor was not able to provide a reason as to why he was falsifying his timesheet.

Recommendation is termination of employment for falsification of company documentation / time fraud.

Later, Hodes told Jaquith that the compliance board had affirmed her recommendation that Lawlor and Bieluch be terminated. Both Lawlor and Bieluch were terminated effective February 3, 2016.

Jaquith testified credibly that other than the cases of Lawlor and Bieluch, he is unaware of any other alleged instances of improper timekeeping or theft of time occurring "on his watch."

Credibility and witnesses

There were only two witnesses in this case: Jaquith and Hodes. Lawlor was present for the first day of hearing but was not called to testify. Bieluch, as far as I know, was not present, although he could have been and not been identified. No explanation for their failure to testify was offered. There is no rule that alleged discriminatees must testify at a Board proceeding. However, in the circumstances of this case, I agree with the Respondent that the failure of them to do so is of consequence. Hodes and Jaquith's testimony, while sparse in many ways appeared to me to be offered credibly. It was also offered without contradiction, and it is the only account of events. The unexplained failure to testify in the face of Hodes and Jaquith's credible testimony bolsters the conclusion that Hodes and Jaquith reasonably believed, consistent with their testimony, and their explanations for their belief, that Lawlor and Bieluch committed the misconduct as the Respondent alleges. While this crediting of the unrebutted testimony of Hodes and Jaquith does not end the case, it is not without significance.

Analysis

The complaint alleges that Lawlor and Bieluch were terminated in retaliation for their union activity (complaint ¶7) and in retaliation for the protected activity of testifying at the September 2015 representation hearing (complaint ¶8), in violation of Sections 8(a)(3), (4), and (1) of the Act. Section 8(a)(3) makes it an unfair labor practice to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) makes it an unfair labor practice to "discriminate against an employee because he has filed charges or given testimony under this Act."[9]

The Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) provides the appropriate analytical standard for

[9]Any conduct found to be a violation of Sec. 8(a)(3) and/or 8(a)(4) would also discourage employees' Sec. 7 rights, and thus, is also a derivative violation of Sec. 8(a)(1) of the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

assessing the violations alleged in this case. *Wright Line* is the Supreme Court-approved analysis in 8(a)(1) (3), and (4) cases turning on employer motivation for action against employees allegedly motivated by the employees' protected activity. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis); *American Gardens Management Co.*, 338 NLRB 644, 645 fn. 7 (2002) (endorsing application of *Wright Line* standard to 8(a)(4) allegations); *Verizon*, 350 NLRB 542, 546–547 (2007).

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that union or other protected conduct was a motivating factor for the employer's adverse employment action. Under the *Wright Line* framework, as developed by the Board, the elements required in order for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are union or protected activity, employer knowledge of that activity, and union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015). Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

In terms of the General Counsel's *Wright Line* burden for the 8(a)(3) allegation, in this case, other than the possibility that their testimony at the representation hearing constituted union activity, the record contains no evidence of union activity by Lawlor or Bieluch. And there is no record evidence that the Respondent knew of or believed there was union activity on behalf of Bieluch or Lawlor. The General Counsel relies on the fact, referenced in the representation hearing report, that only five employees voted for the Union in the first representation election, to "conclude that Respondent presumed Lawlor and Bieluch were among those five union supporters." The suggestion is that given the small number of voters for the Union, it can be presumed that Lawlor and Bieluch's appearance as witnesses for the Union gave the Respondent knowledge of their union activity. I do not agree with that. As the Respondent points out, all three union witnesses at the representation hearing were subpoenaed, and thus, the mere fact of testimony is not necessarily indicative of union activity or support. Be that as it may, the 8(a)(3) allegations need not be reached—the first two elements of the 8(a)(4) claim are easily established: both Lawlor and Bieluch testified in the representation hearing, and the Respondent obviously knew about it. Indeed, Lawlor was credited over the Respondent's manager, and one of the union's objections leading to the rerun election were sustained based on his testimony. Thus, the first two elements of *Wright Line* are established for the 8(a)(4) claim (and the 8(a)(3) claim need not be considered further).

The third *Wright Line* element, animus, is not strong, but I will assume without deciding that it meets the standards set by the Board to prove the General Counsel's prima facie 8(a)(4) case under *Wright Line*. The demonstrated instances of animus are the two instances of objectionable conduct that resulted in the overturning of the first representation election. One was a slideshow presented to the bargaining unit on August 5, 2015, presented by Tyco's head of labor relations, which was found by the hearing officer to have contained coercive and threatening statements. See GC Exh. 2 at 15–16. The other was a July 2015 coercive interrogation of Lawlor by an official of the Respondent. The seeming remoteness of this animus to the February discharges is offset by the fact that these incidents served as the basis for overturning the first union election after a hearing on election objections at which Lawlor and Bieluch testified. The resulting rerun election occurred in December just 1–2 months before the discharges.

At the same time, I reject the General Counsel's argument that the timing of the discharges provides additional evidence from which an inference of discrimination could be taken. The Board has long recognized that in discrimination cases unexplained timing can be indicative of animus. *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Here, it is true that Lawlor and Bieluch's discharges came just one month or so after the rerun election, and were allegedly prompted by the testimony of Lawlor and Bieluch in the representation hearing. However, the Respondent has provided an alternative explanation for the timing and it is unrebutted and credited: the investigation into Lawlor and Bieluch was prompted by Ace billers seeking information from Jaquith that caused him to review their paperwork and in doing so, he discovered glaring discrepancies in their timesheets. This explains the timing of the discharges and the explanation has nothing to do with the rerun election or the testimony at the hearing producing the rerun election.[10]

Between the evidence of animus and the fact of Lawlor and Bieluch's participation as adverse witnesses in the proceeding that led to the rerun of the election, I assume that the General Counsel has met his *Wright Line* burden. In other words, I assume that an inference can be drawn that protected activity—Lawlor and Bieluch's testimony in the representation hearing—was a cause for their discharges.

This assumption means a violation of Section 8(a)(4) has been proven subject to the Respondent's ability to show that—even if it fails to meet or neutralize the General Counsel's showing—it would have discharged Lawlor and Bieluch in the absence of their protected activity of testifying in the representation case. Notably, where "the General Counsel makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial." *Bally's Park Place v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011); *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 5 (2014). "Of course," conversely, and of relevance here, "'the weaker a prima facie case against an employer under *Wright Line*, the easier for an employer to meet his burden . . . of proving [the employer's action] would have occurred regardless of protected activity.'" *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1113 (D.C. Cir. 2002) (court's bracketing and ellipses, quoting *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 582 (9th Cir. 1982)). In this case, I believe that the Respondent has met that burden.

In order to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steel Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Still, it bears remark that the undisputed, unchallenged, and credited evidence is that the Respondent found and reasonably concluded that Lawlor and Bieluch had engaged in fraud as described by the Employer's policies. When offered the opportunity to explain or provide an explanation, both employees failed to do so. In other words, Lawlor and Bieluch's actions were surely legitimate

[10] I also reject the Union's argument on brief that animus supporting the General Counsel's case may be found based on the Board findings from 2001 and years before that Grinnell Fire Protection Systems violated the Act. See *Grinnell Fire Protections Systems*, 335 NLRB 473 (2001) (citing cases). In addition to the long length of time between the violations found and the violations alleged here, none of the older cases involve the Windsor, Connecticut facility, and indeed, there is no specific evidence as to the precise relationship between the respondent in those cases and the Respondent here.

grounds for discharge, a point which neither the General Counsel nor the Union contest with any evidence at all.[11]

In any event, as noted, the Respondent must show that it would have acted against the employees in the absence of their protected activity. Given the state of the record, the evidence supports the Respondent on this determinative point.

First, the undisputed and credited evidence is that these are the only "theft of time" incidents with which Jaquith was aware during the time that he was a fitter supervisor. Thus, there were no other "theft of time" incidents that were brought to Jaquith's attention that he ignored. In the case of Lawlor and Bieluch, the undisputed unrebutted credited testimony is that Jaquith acted against them based on circumstances and discrepancies that came to his attention when ACE billers contacted Jaquith raising questions about Lawlor and Bieluch's work papers for reasons unrelated to protected activity or union animus. There is no evidence that Jaquith singled out Lawlor or Bieluch. The fact that these were the only two employees whose discrepancies were brought to Jaquith's attention, means, among other things, that there are no real comparators. Employer knowledge of other cases of "fraud" that went unpunished is absent.

This limits the General Counsel's room for argument to the claim that it is suspect that the Employer, having found discrepancies in Lawlor and Bieluch's records, and having confronted them and established to a near certitude that they engaged in fraud, did not search through the records of all other employees searching for discrepancies. This is unconvincing. The unrebutted testimony is that this Employer did not monitor employees in that way.[12]

This ends the matter, but it is notable that the General Counsel offers no convincing evidence that others engaged in "theft of time." The General Counsel's method of trying to show this at trial involved rifling through cold GPS and timesheet records of other employees and questioning Jaquith about potential discrepancies suggested by the General Counsel. This was not compelling. In the first place, it amounted to a game of blind man's bluff. Neither the General Counsel nor Jaquith, nor any witness was familiar with any of the incidents focused on by the General Counsel. None of the employees at issue were called by the General Counsel to explain what their records showed. Jaquith, although being asked to speculate on the spot, based on no investigation, no discussion with the people involved, and never having reviewed these incidents,

[11]The claim (GC Br. at 11) by the General Counsel that Jaquith admitted that Lawlor and Bieluch's discrepancies were not so "'out of whack' [Tr, 337] as to raise a red flag in his mind" is incorrect in two ways: first Jaquith was not talking about Lawlor and Bieluch when he made the quoted statement—rather he was talking about other employees' discrepancies pointed out to him by the General Counsel. Second, the General Counsel's argument significantly and unrealistically minimizes the discrepancies in Lawlor and Bieluch's records and the import of their lack of legitimate explanation for them.

[12]The General Counsel places more weight than the point can hold on the fact that Hodes claimed to her superiors in the termination memorandum that she and Jaquith "reviewed timesheets for the rest of the team . . . and validated that in fact, the rest of the team is accurately reporting." Based on the testimony and evidence, this is an overstatement: Jaquith testified only to a random (and fairly cursory) review of other employees' timesheets. But this misstatement hardly queers the Respondent's case. The fact is there is no evidence that Hodes or Jaquith were aware of any other current employee engaging in the misconduct for which they discharged Lawlor and Bieluch.

was—sometimes but not always—able to propose an explanation of why a discrepancy claimed by the General Counsel did not trigger a suspicion in his mind of time fraud. And it is notable that the General Counsel's perusal of the records unearthed only a smattering of claimed discrepancies (GC Br. at 23–26) involving three employees out of what must have been thousands of service calls. This documentary review is far too uncertain to constitute solid evidence of disparate treatment toward Lawlor or Bieluch, or even of other examples of time fraud. See, *Libertyville Toyota*, 360 NLRB at 1302 (Board finds that employer met its *Wright Line* burden when evidence showed that it fired employee—towards whom it had animus—for losing his license where comparator evidence was too vague to show inconsistent treatment of other employees). The General Counsel's claim that employees "routinely submit similarly inconsistent documents [ ] with no consequence" is unproven on this record.

Finally, the General Counsel's attack on the mechanics of the investigation into Lawlor and Bieluch does not advance the General Counsel's case, or undermine the Respondent's. For one thing, the General Counsel simply ignores the undisputed evidence that as part of the investigation Lawlor and Bieluch were interviewed and given a chance to explain the significant discrepancies found in their work records. They were unable to do so. Moreover, the quality of the complaints about the investigation only demonstrate the thinness of the General Counsel's case. He argues that the "biased nature" of the investigation is shown by the failure of Jaquith to review Lawlor and Bieluch's personnel and disciplinary history, by the Respondent's decision to talk to counsel about the investigation, by the decision to suspend the employees pending further investigation after the interviews, and by the failure of Jaquith to review every other employees' work record. None of these stands out as evidence of bias, or raise suspicion, particularly in a situation where the discharged employees have failed to effectively deny or counter the allegations of significant misconduct.

Under *Wright Line*, an employee who engages in protected activity, even an employee towards whom an employer has unlawful animus, is not immune from being discharged for conduct which would have gotten him fired in the absence of his protected activity. Here, Lawlor and Bieluch engaged in significant misconduct, with no explanation or defense offered, in violation of the employer's rules. No other similar instances were brought to the attention of the employer, even after the employer engaged in a random review of records, although additional instances of the alleged discriminatees' misconduct were found when Lawlor and Bieluch's recent records were reviewed. The employer fired them for it, and all the creditable evidence indicates that it would have done so in the absence of their protected activity. I dismiss the complaint.

CONCLUSIONS OF LAW

The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

[13]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 14, 2017

David I. Goldman
U.S. Administrative Law Judge